

FILE COPY

U.S. Supreme Court, U. S.
FILED
JAN 22 1947
CLERK OF SUPREME COURT

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 937 36

MARGARET E. SHERRER

Petitioner.

EDWARD C. SHERRER

**PETITION FOR WRIT OF CERTIORARI TO THE
PROBATE COURT FOR THE COUNTY OF BERK-
SHIRE, COMMONWEALTH OF MASSACHUSETTS,
AND BRIEF IN SUPPORT THEREOF.**

FREDERICK M. MYERS,

FRANCIS J. QUIRICO,

Counsel for Petitioner.

INDEX

SUBJECT INDEX

	Page
Petition for writ of certiorari	1
Statement of the matter involved	1
Reasons relied on for the allowance of the writ	2
Brief in support of petition	5
A. Authority for the issuance of the writ	5
B. Summary of the points presented	6
C. The State Court has failed to give the proper effect to the fact of the respondent's participation in the Florida proceeding, and has erred in reversing the Florida finding of domicile	6
1. In the absence of fraud and collusion when a party has taken part in litigation, there is no more right to relitigate the question of domicile than any other question put in issue by the pleadings	6
2. The finding that there was no domicile in Florida and that the petitioner intended to return to Massachusetts after getting her divorce is in total disregard of the rule that the burden of proof was on the respondent to show lack of jurisdiction in the Florida court	7

CASES CITED

Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522, 524	3, 6
Davis v. Davis, 305 U. S. 32, 42	3, 6
Essenwein v. Commonwealth, 325 U. S. 279, 280	7
Williams v. North Carolina, 325 U. S. 226, 230	6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No.

MARGARET E. SHERRER

Petitioner.

v.

EDWARD C. SHERRER

PETITION FOR WRIT OF CERTIORARI

Now comes Marguerite E. Sherrer and respectfully petitions this Court to allow and issue a writ of certiorari to require that there be certified to this Court for review and determination the cause, the record of which remains in the Probate Court for the County of Berkshire, Commonwealth of Massachusetts, numbered 52914, wherein the petitioner is the respondent and the respondent is the petitioner, and wherein final judgment has been entered under a decision of the Supreme Judicial Court for the said Commonwealth, reported in Massachusetts decisions, Advance Sheets (1946) page 1193.

This action was brought by the respondent in the said Probate Court for the County of Berkshire for a decree that the petitioner had deserted the respondent and that the respondent was living apart from the petitioner for

justifiable cause. In answer the petitioner alleged that she had been divorced from the respondent under a decree entered by a Florida court at a time when she was a resident of Florida and in a divorce proceeding in which the respondent had participated personally and through counsel, and by his answer specially putting in issue the matter of her domicile in Florida.

The reasons relied on by this petitioner for the allowance of the writ are as follows:—

I.

To permit the respondent to attack the validity of the Florida decree violated the full faith and credit provisions of the United States Constitution in the following respects:—

(a) The domicile of the petitioner was in issue under the pleadings in the Florida court, having been specially alleged by the petitioner and specially denied by the respondent.

(b) The respondent had appeared, filing answer denying domicile, and had been present in court at the hearing on the divorce and the issue of domicile was, therefore, res judicata as to the respondent.

(c) The facts showed that the petitioner was actually domiciled in Florida within Florida requirements at the time the divorce was granted.

II.

The action of the Supreme Judicial Court of Massachusetts in affirming the decree entered in the Probate Court of the County of Berkshire is grounded on the finding that the Florida divorce was invalid and is, therefore, a denial of full faith and credit to that decree in conflict with Section 1 of Article 4 of the United States Constitution and also in conflict with the decisions of this Court in *Davis v. Davis*, 305 U. S. 32, 40 and *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U. S. 522, 524ff.

FREDERICK M. MYERS,

FRANCIS J. QUIRICO,

Counsel for Marguerite E. Sherrer.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No.

MARGARET E. SHERRER

Petitioner.

v.

EDWARD C. SHERRER

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI**

A.

Authority for the Issuance of the Writ.

This case involves the question whether the Massachusetts courts have failed to give full faith and credit to a judgment of a Florida court by refusing to recognize the validity of a Florida divorce and also involves the subsidiary question whether there was a violation of the Full Faith and Credit Clause in permitting the respondent to attack the domiciliary finding made by the Florida court in view of the respondent's participation in the Florida proceedings. A question involving the Constitution of the United States is presented.

Summary of the Points Presented.

The State court has failed to follow the construction required by the decisions of this Court as to the effect of the Full Faith and Credit Clause of the Constitution in the following particulars:—

1. It has failed to give due weight to the fact that, by reason of the participation by the respondent in the proceedings in the Florida Court, the question of the petitioner's domicile was *res judicata* as to the respondent.

2. In arriving at the finding that the petitioner was not domiciled in Florida, the State court has given no effect to the principle established by the decisions of this Court that the burden was on the respondent to show a lack of jurisdiction in the Florida court.

The State Court Has Failed to Give the Proper Effect to the Fact of the Respondent's Participation in the Florida Proceeding, and has erred in reversing the Florida finding of domicile.

1. In the absence of fraud and collusion when a party has taken part in litigation, there is no more right to relitigate the question of domicile than any other question put in issue by the pleadings.

Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522, 524.

Davis v. Davis, 305 U. S. 32, 42.

Williams v. North Carolina, 325 U. S. 226, 230.

The record shows that the respondent retained Florida counsel, entered a general appearance, filed an answer which among other things denied allegations as to the petitioner's residence; that he was present in court during the hearing in the divorce proceeding, although he remained "in a side room"; that his attorney was present throughout the hearing but did not cross-examine the petitioner. (Record, Page 10).

The statement in the court's opinion that the ruling in *Davis v. Davis* "was based chiefly upon decisions in cases not involving marital relations" (Record, Page 64) disregards the fact that that case was itself a case involving the validity of a divorce decree.

There was no evidence of collusion or fraud on the court in this case nor does the Massachusetts court make a finding to that effect. If the law is established as set forth in this case a party who, absent fraud or collusion, has arrived at the decision that the controverted allegations as to domicile are well founded and; therefore, refrains from cross-examination on that issue is left in a more favorable position than one who doubts the allegation and vigorously but unsuccessfully contests that issue.

2. The finding that there was no domicile in Florida and that the petitioner intended to return to Massachusetts after getting her divorce is in total disregard of the rule that the burden of proof was on the respondent to show lack of jurisdiction in the Florida court.

The record is barren of any evidence to show an intent on the petitioner's part contrary to the intent testified to by her and the mere fact, relied upon by the court, that she brought her petition for divorce at the expiration of the statutory period of residence in Florida does not justify such a finding in view of the other evidence.

FREDERICK M. MYERS,
FRANCIS J. QUIRICO,
Counsel for Marguerite E. Sherrer.